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In the

Supreme Court of the United States

OCTOBER TERM, 1942

No.

G. B. HOWELL, ET AL, *Petitioners*

VS.

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., ET AL *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, G. B. Howell, Mary T. Howell, J. V. Howell, Kiowa Drilling Company, Inc., Harry Fotiades, Mary Urania Fotiades, William P. Ford, pray for a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the 7th Circuit, entered May

2, 1942, (R. 2), affirming the decree of the United States District Court for the Eastern District of Illinois, entered August 20, 1941, (R. 224). Both respondents and petitioners, along with other defendants, took separate appeals from the judgment of the trial court on questions adversely affecting them. Respondents' appeal is No. 7811, and petitioners' No. 7812, in the Circuit Court of Appeals. A single record was used for both appeals, and a single opinion was written disposing of them, taking no separate cognizance of the respective appeals. While these petitioners are primarily seeking a writ of certiorari to review the judgment of the Circuit Court of Appeals in No. 7812, since it is difficult to ascertain what portion of the opinion is applicable to petitioners' appeal, and since only one record was taken to the Circuit Court of Appeals, we are also requesting review of the judgment in No. 7811, only insofar as it may be affected by the questions presented herein. A petition for rehearing was filed by these petitioners May 15, 1942, (R. 291), was entertained, and was denied on June 9, 1942, (R. 351), so that the petition is filed within the time prescribed by the Act of February 13, 1925, on which jurisdiction rests.

Statement of the Matter Involved

The issue in this case is as to whether, under the law of Illinois, there remained in respondents, holding under the deed hereinafter set out, any fee title to, or other property rights in, the oil and gas underlying the land described

therein after the year 1926, since both lower courts held that respondents' rights to use or occupy the surface of the land, for the purpose of exploring for and producing oil and gas, had terminated, because of respondents' breach of an express condition or limitation in the deed, upon compliance with which such rights depended.

The district court decreed that the respondent grantee, and its lessee, own the oil and gas under said land, and the sole and exclusive right to remove the same, but without entering upon or using the surface for that purpose; and then decreed that neither John P. Minier, the grantee in the deed, nor those claiming under him, has any right, title, or interest in the oil and gas under said land, and no right to mine or operate for the same, (R. 224). The Circuit Court affirmed the judgment of the district court, although erroneously stating that the latter's decision vested the oil and gas in the respondent grantee, without limitation or restriction, (R. op. last paragraph 287).

Thus, both courts decreed that, while respondents owned the oil and gas, neither respondents nor petitioners had the right to use the surface to operate for or produce the same. The result of these holdings is that neither party can use the surface to produce the oil and gas, but that one party owns it, nevertheless.

The material portions of the deed under construction, other than the description of the land and the acknowledgments, follow:

"The Grantors, John P. Minier and Rosa M. Minier, his wife, * * *, for and in consideration of the sum of ($6280) Sixty Two Hundred Eighty Dollars in hand paid, Convey and Warrant to Walter W. Williams * * *, all the coal, oil and gas underlying (describing the land).

* * * *

Together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by mining out the coal, oil or gas * * *. It is also covenanted and agreed that the Grantee herein, his heirs and assigns, shall have the right to take and use so much of the surface of said land as may be deemed necessary for the purpose of erecting, maintaining and operating, hoisting, air, pumping, and escape shafts, drains, ditches, and reservoirs, telephone and electric light and Power wires and the necessary roadways and railroad tracks to and from the same, with the right-of-way for any railroad necessary or required to carry said coal, oil and gas to market, but all the land the surface of which is so taken shall when occupied be paid for at the rate of One Hundred ($100.00) Dollars per acre.

It is understood that within two years after the Mine shaft intended to be used for the purpose of removing the coal from under the premises herein is completed all the surface privileges above set forth that the Grantee herein desires to exercise shall, either for Mine switches or for whatever purpose, be selected and paid for and the Grantor herein will execute a deed therefor, the surface privileges on the remainder of said land shall at the end of said two years be fully released and the right of the Grantee herein to take

any portion of the surface of the remainder of said lands is at an end.

* * * *

Dated this 16th day of March, A.D. 1914.

(Signed) John P. Minier (Seal)
(Signed) Rosa M. Minier (Seal)"

(R. 86-88).

At the trial, it was stipulated that the mine shaft referred to in the deed was completed in 1924; that no portion of the surface of the land had ever been selected, used, or paid for by the grantee, Walter W. Williams, or respondents who have succeeded to his title, nor have they ever obtained a deed for any portion of the surface subsequent to the quoted deed, (R. 109).

Respondent, Chicago, Wilmington & Franklin Coal Company, hereinafter called the Coal Company, obtained a deed from Walter W. Williams, conveying all his rights as grantee under the foregoing deed, dated February 4, 1918, (R. 89), which is substantially in the same form as the quoted deed.

On September 6, 1940, respondent Coal Company gave an oil and gas lease, reserving the usual royalty, to E. S. Adkins, (R. 93), which he assigned to respondent Shell Oil Company, hereinafter called Shell, (R. 102).

John P. Minier and wife, Rosa Minier, grantors in the quoted deed, claiming that all of the grantee's rights to oil and gas under the quoted deed had terminated, on January

17, 1941, gave an oil and gas lease on the land to William P. Ford and John H. Wall, (R. 124). On February 21, 1941, Minier and wife conveyed to said Ford and Wall "the sole and exclusive right to use the surface, for the purpose of mining and operating for oil and gas and all operations incident thereto" (R. 129). All rights under both these instruments by mesne assignments are now owned by petitioners. (R. 131, 133, 135, 137, 139, 141, 143, 145, 147).

Respondents as plaintiffs, instituted this suit on April 26, 1941, against petitioners as defendants (R. 2). John P. Minier and wife, Rosa M. Minier, and their children, Mary E. Minier, Robert V. Minier, and Willie Minier (to whom royalty interest had been deeded by John P. Minier and Rosa Minier), were also joined as defendants (R. 2), but after the decision of the Circuit Court of Appeals, they made some character of settlement without the consent of petitioners, and the terms of which are unknown to petitioners, and do not join in this petition for certiorari.

Prior to the filing of this suit by respondents, petitioners had commenced the drilling of an oil well on the land (R. 7). Without notice or hearing, upon respondents' petition, the trial court restrained petitioners from continuing to drill said well, and by the same order, restrained petitioners from interfering with respondents in the exercise of their claimed right to drill upon the land, thereby permitting respondents to commence drilling upon the land.

Thereafter, to protect the property from "irreparable damage" which would result from adverse drainage by wells on adjoining lands, a stipulation (R. 56) was signed by all parties. Under this, respondent Shell has drilled four oil wells on the West Half and petitioners G. B. Howell, et al, have drilled five wells on the East Half of the land involved. These wells have been operated, by the parties who drilled them, down to this day (R. 269). All costs of drilling and operating these wells, under terms of the stipulation, have been repaid to the parties who expended them out of the proceeds of oil produced from the property, except as to the costs of drilling the first well on the East Half and the first well on the West Half. The stipulation provides for reimbursement to the respective parties for the drilling of these two wells only to the extent of $5,000 each; the balance of the costs of drilling and equipping each of said wells (about $8,000) has been withheld and is to be repaid to the losing party only if the court holds that he is legally entitled to the value of this improvement (R. 58). These wells were drilled and have been operated, according to the stipulation, "without in any manner whatsoever waiving any of their respective rights and claims as to the merits of the controversy" (R. 57).

The proceeds of oil from all the wells, over and above the development and operation expenses which have been repaid to the extent above set forth, is several hundred thousands of dollars, which will be affected by the final decision of the case, as well as the value of the oil and gas rights governing future production.

Rulings of the Court Below

The Circuit Court affirmed the judgment of the District Court. In doing so, it held that the two-year clause for the termination of "all" surface rights applied to operations for oil and gas, and that under the limitation in the deed, the respondents had lost the right to occupy or use any part of the surface of the land for the purpose of exploring and producing oil and gas (R. 286). Nevertheless, it held that respondents continued to own the oil and gas in fee under this land, and affirmed the judgment of the trial court, decreeing that petitioners had "no right, title, or interest in or to the oil or gas underlying said real estate and have no right to mine or operate for oil or gas in or on said real estate" (R. 225), and permanently enjoining petitioners from "drilling, mining, or operating for the purpose of producing or attempting to produce the oil or gas" under said land (R. 226).

Jurisdictional Statement

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, ch. 229 (43 Stat. 938) 28 U.S.C.A., Section 347(a).

The judgment of the Circuit Court of Appeals was entered May 2, 1942, (R. 288); petition for rehearing was denied June 9, 1942, (R. 351).

A copy of the opinion of the Circuit Court of Appeals delivered by it upon rendering the judgment sought to be reviewed is appended hereto.

Questions Presented

1. The rights of the grantee in said deed, and his successors in title (respondents) to occupy or use the surface of the land to explore for oil and gas terminated in 1926, under the limitations in the deed, and the question here is whether after the termination of such rights, respondents continued to own the fee title, or any other right to the oil and gas under said land, or whether, after such termination, such rights were owned by the surface owner, from whom the petitioners hold an oil and gas lease.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals that respondents continued to own the fee title to the oil and gas, and were entitled to restrain petitioners even after they lost their right to use the surface to operate for and produce them, is in conflict with the following decisions of the Supreme Court of Illinois.

(a) Bruner vs. Hicks, 230 Ill. 536, 542, 82 N.E. 888—holding that no title is vested by a conveyance of oil and gas, except the "right to occupy the premises" for the purpose of producing them.

(b) Poe vs. Ulrey, 233 Ill. 56, 61, 84 N.E. 406—holding that a freehold estate of homestead was involved

"not because the lease of oil and gas was a conveyance of an interest in the homestead, but because of the rights granted in the surface".

(c) Gillespie vs. Fulton Oil and Gas Company, 239 Ill. 326, 331—holding that an oil and gas lease conveyed "merely the right to go upon the premises and explore for oil and gas and if found, to produce them".

(d) Updike vs. Smith, 378 Ill. 600, 604—holding the right to enter land for the purpose of prospecting and producing is a freehold.

(e) Transcontinental Oil Company vs. Emerson, 298 Ill. 394, 131 N.E. 645—holding that oil and gas are not susceptible of ownership, apart from the soil; that the only right which may be conveyed is the right to enter upon the land for the purpose of prospecting and operating for oil and gas, "which is a corporeal freehold interest".

(f) Watford Oil & Gas Company vs. Shipman, 233 Ill. 9, 84 N.E. 53, 54, and Carter Oil Company vs. Liggett, 371 Ill. 482, 21 N.E. (2d) 569, both holding that a grant or lease of oil and gas conveys nothing in the land which can be a subject of ejectment or a real action, but conveys only the right to occupy and use the land for the exploration of and production of oil, if found.

(g) Trigger vs. Carter Oil Company, 372 Ill. 182, 23 N.E. (2d) 55, 56—holding "no title vests in the grantee until it is actually removed from the land".

2. The decision of the Circuit Court of Appeals, to the effect that the respondents continued to own the fee title to the oil and gas, even after the termination of their right to use the surface to operate for and produce them, is in

conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Butler vs. McGorrisk*, 114 Fed. 300.

In the latter case, a deed conveyed "all the coal and the right to mine and remove the same", but provided that the grantee was "to mine and remove the same by May 1, 1891, and no coal is to be mined after that date". The court held that the grant of coal was so "indissolubly linked" with the right to mine it, that a limitation on the right to mine, when it expired, also terminated the grant of coal.

3. The right to use the surface of the land to operate for and produce oil and gas was the real beneficial grant which was fully effective at the time the deed was given and for a reasonable time thereafter. When respondents failed to exercise their right of selecting and paying for such part of the surface as they needed for their operations within the time limit, and their right to use the surface terminated, it should be held that their right to produce oil and gas also terminated and that it reverted to the grantor, because:

(a) Respondents are then denied the only practical means of producing oil and gas and of enjoying that mineral right.

(b) It is against public policy that an estate in land should be allowed to continue after a limitation provision has become operative causing the termination of all practical means for its enjoyment.

(c) The decision of the Circuit Court created an unreasonable division of the incidents of ownership, giving to each party no greater right than to prevent the other from using and enjoying the oil and gas, thus

resulting in a withdrawal of this vital natural resource from the channels of trade and denying its benefits to the public.

(d) By this anomalous decision (so designated by the trial court), the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this court's power of supervision.

WHEREFORE, petitioners pray that a writ of certiorari issue in this cause to the end that it may be reviewed and that part of the judgment below be reversed, which holds (1) that respondents continued to own oil and gas in fee after the termination of their right to use the surface of the land to produce them, and (2), which holds that respondents are entitled to an injunction preventing petitioners from drilling for oil and gas on the land.

Respectfully submitted

G. B. HOWELL, MARY T. HOWELL, J. V. HOWELL, KIOWA DRILLING COMPANY, INC., HARRY FOTIADES, MARY URANIA FOTIADES, WILLIAM P. FORD,

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